Supreme Court of the United States

OCTOBER TERM 1950

No. 565

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA DISTRIBUTING CORPORATION, *et al.*,

Appellants.

against

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and COLUMBIA BROADCASTING SYSTEM, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLANT EMERSON RADIO AND PHONOGRAPH CORPORATION

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March 26, 1951.

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BRIEF FOR APPELLANT EMERSON RADIO AND PHONOGRAPH CORPORATION

This is an appeal by intervening plaintiff, Emerson Radio and Phonograph Corporation (hereinafter referred to as Emerson) from a final judgment entered on December 22, 1950, of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint in this suit on a motion for summary judgment.

Opinions Below

The majority and dissenting opinions of the District Court (R. 863-881) are not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions for direct appeal, Title 28, U. S. C., §§ 1253 and 2101(b), made applicable by § 402(a) of the Communications Act of 1934 as amended (48 Stat. 1064, 1093, 63 Stat. 108; 47 U. S. C. § 402(a)). The orders appealed from (R. 882, 883) were entered December 22, 1950 and January 23, 1951, and the appeal was allowed (R. 892) on January 25, 1951. This Court noted probable jurisdiction on March 5, 1951.

Statutes Involved

The relevant statutes, to which reference will be made, appear in Appendix "A" to the RCA brief. The Regulations involved appear at R. 432-434.

Questions Presented

The questions presented are set forth in the Jurisdictional Statement at pp. 9-11, and are not repeated here.

Statement

The basic facts are covered in the briefs of appellants, including particularly Radio Corporation of America (hereinafter referred to as "RCA"). We shall try to avoid repetition.

The Special Interest of Emerson

Emerson is a leading producer of radio and television receiving equipment. Over half a million of Emerson's television receivers were in use by the public at the time of

the hearing below and this number is being increased by a sales volume of approximately forty thousand per month (R. 538).

Emerson's business reputation and the public confidence which it has established in the standard of quality of its products would be seriously impaired if it should be compelled to offer to the public the substandard equipment required by adherence to the CBS standards.

Although the Commission's Order of October 10, 1950 is not yet in effect, its harmful impact upon Emerson has already become evident. Between October 10, 1950, when the Order was issued, and November 9th, when the pleading in intervention was verified, Emerson had suffered a 60% drop in its backlog of unfilled orders (R. 541).

The system of color television—the CBS system—which the Commission has adopted is one which is incompatible, *i.e.*, existing television sets cannot pick up television broadcasts made on the CBS system.

There are presently more than ten million receivers of all makes in the hands of the public and this number is constantly increasing. The owners of these sets will not be able to receive programs broadcast by the CBS color system. If they add an "adapter" in the form of certain additional wire circuits to their sets they will be able to receive such programs, but only in black and white. If they also add a "converter" in the form of a mechanical, whirling color wheel, they will be able to receive CBS broadcasts in color.

The exact cost of these adapters and converters is, of course, unknown because they are commercially unavailable at the present time; indeed, commercially undesigned at the present time. The Commission itself accepted estimates of

from $95 to $130 for adapting and converting a 7 inch set and proportionately higher figures for larger sets (R. 148). After incurring this expense, which may amount to half again the original cost of the receivers, the television set owners will be able to receive the color broadcasts transmitted by the CBS system.

There are certain grave limitations inherent in this system. For the present at least, the CBS system is limited to projection receivers or to direct view tubes of 12½ inches or less in size. Another limitation is that the CBS system has less "geometric resolution" than the present black and white system. In addition, there are certain deficiencies in the CBS system due to color breakup and color fringing.

Emerson's reputation and good will are bound to suffer impairment if, in consequence of the Order, Emerson should be obliged to offer to its customers television receivers, adapters and coverters, which have not yet been commercially designed, and which if manufactured will rapidly become obsolete. Implicit in the Commission's Report is the finding that the mechanical color disc therein authorized and approved will soon be superseded by an electronic color tube (R. 164-165).

As a manufacturer of television sets from the very beginnings of the industry, Emerson has been able to forge to the front rank because of its ability to judge the direction of public taste and its capacity to satisfy the public demand at a price the public is willing to pay.

In the judgment of Emerson, the television audience will be discontented with the decline in picture definition which the Commission found to be inherent in the CBS system. Nor will the public be content with a picture limited to 12½ inches. The trend in the industry has

moved rapidly in the direction of larger picture size. So marked has been that trend that at the time of filing its pleading below Emerson planned, by the end of the year 1950, to abandon general production of any models under 16 inches in size (R. 540).

In Emerson's considered view, its customers will resent the need of adding further expensive equipment to its presently outstanding sets. Should Emerson, impelled by competitive necessity, put its trade mark on these deficient wares, it will necessarily suffer a blow to its good will and reputation. Furthermore, in view of the obsolescent character of the CBS system, Emerson will face an inventory loss and a loss on its commitments for parts necessary to install the adapters and color wheels in receivers. This loss will be larger or smaller depending on the manufacturer's skill or good luck in guessing the precise moment when these parts will take their place as the museum pieces of a rapidly expanding art.

The injury thus inflicted upon the manufacturer will to a very large degree likewise be inflicted upon the public. The 10,000,000 existing television set owners have by their investment of over $2,000,000,000 created the audience which, through advertising, has financed the phenomenal growth of television and indeed made possible the present expansion into color. By the introduction of an incompatible color system, these owners will be excluded from a portion of the available broadcast service unless they spend a large sum of money, encumber their sets with short-lived gadgets, and expose their sets to the service of personnel as yet untrained in the conversion operation. And these burdens must, however unjustifiably, hurt the good will of the manufacturers who sold the public their sets

upon the mutual supposition that the sets would make available to the buyer—at least in black and white—all commercial television programs.

Emerson has no interest in either the CBS or the RCA system as such. Emerson does have an interest in making certain (a) that the Commission will not adopt a color system that will render obsolete the millions of televisions sets now in the hands of the public, including the hundreds of thousands of such sets heretofore purchased from Emerson; (b) that the Commission will not adopt any color systems until the art has been sufficiently perfected and stabilized so that the customers who buy color television sets from Emerson will not find those sets obsolete in the near future; and (c) that if action be taken now, in the immature stage of the art, then at least the Commission will not, by imposing only one system of color television, prevent the improvement and development of color television that may be expected from competition between two or more co-existing systems of color television.*

To protect these interests, Emerson sought and obtained leave from the District Court to intervene (R. 791). It is thus a proper party appellant (28 U. S. C. § 1253).

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*In these senses, Emerson may perhaps be deemed to be acting as a sort of "private attorney general" in the public interest. "Such persons, so authorized are, so to speak, private Attorney Generals." Frank, C. J., in *Associated Industries* v. *Ickes*, 134 F (2) 694, 704 (CCA 2, 1943); cf. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940); *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4 (1942). The wide scope of standing to appeal from Commission action with respect to its licensing power (48 Stat. 1093; 47 U. S. C. § 402(b)) is paralleled by equally liberal status where the issue involves attack on other orders (like the one here) of the Commission described in 47 U. S. C. § 402(a). See 28 U. S. C. § 2323. In *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 120 (1933) the court said that those mentioned in the statute (e.g. "corporations") "who are interested in the 'controversy or question' in any suit brought by anyone . . . may intervene at any time after institution of the suit . . ."

Specification of Errors

The District Court erred:

1. In granting summary judgment and in holding that it was without power to consider evidence submitted to it for the purpose of determining whether such evidence should have been considered by the Commission.

2. In failing to pass on many of the important issues presented to it for determination.

3. In failing to hold that the order of the Commission is contrary to law and is not supported by the Commission's conclusions, by its findings or by substantial evidence.

4. In failing to hold that the refusal of the Commission to permit the commercial broadcasting of compatible color television systems in competition with incompatible color systems exceeds the Commission's lawful jurisdiction and is not supported by the Commission's conclusions or its findings.

For a full listing of the errors specified on this appeal, the Court is respectfully referred to the appellants' Assignment of Errors (R. 886).

ARGUMENT

Introductory

The orders of the Commission as well as the judgment of the court below are both the products of an avowed preference for haste over discretion:

(1) The Commission, made aware that rapid and revolutionary changes were taking place in the art of color television, was confronted by the need of making a choice between two difficult courses: to learn the facts or to plunge blindly. (First Report § 146, R. 165). In one of the most amazing confessions in the annals of administrative regulation, the Commission announced that it preferred to plunge blindly.

(2) The Court below also deemed itself confronted by a choice between two courses: to grant summary judgment for defendants or to send the proceeding back to the Commission for an evaluation of the changes in the art and in the economic situation (R. 875). Acknowledging that it was moved by considerations of *speed*, the Court chose the former.

Undoubtedly there are emergencies in the administration of human affairs when time is of the essence and decision cannot wait upon mature investigation and deliberation. Undoubtedly administrative agencies are occasionally called upon to make decisions upon matters so trivial and transient that a hasty judgment is all they deserve.

Under review upon this appeal, however, is an administrative order which establishes the gauge for the electronic highways upon which color television must travel. Once established it can no more readily be changed than the gauge of United States railway trackage. Billions of dollars will be spent to accommodate broadcasting and receiving equipment to the new requirements. Surely an order which is to be effective for generations, which will exact so heavy a toll from the public and which is bound to affect for good or ill a new and fecund art, is entitled to be fathered by the fullest information, and to undergo the maximum gestation of reflective deliberation.

The addition of color to the television broadcast is after all but an attractive amenity. It will probably not usher in the millenium; and even if it were the harbinger of everlasting bliss, would it not have been wiser to wait a few months for the most up-to-date bliss, with the latest improvements?

It is a cliché of administrative law that the courts will not appraise the wisdom of agency action. This generalization has its bounds. When the administrative decision departs so far from familiar wisdom that it is no longer consonant with common sense, the courts do not hesitate to denominate the decision arbitrary and to knock it down.

We submit that the Orders here under review defy common sense.

The two Reports of the Commission disclose, though but partially and faintly, the essential fact distilled from the long record made during the administrative proceeding: that the science and art of color broadcasting is in a state of explosive inventiveness. So rapid was the rate of change that by the time the hearings closed, the evidence received in its opening weeks seems already to have acquired an archeological patina. By the time the orders were made, the Commission was informed that the current facts had already left the closing days' evidence far behind them.* For any agency, under such circumstances, to congeal the standards and methods of color broadcasting, to make it available only to obsolete 12½ inch receivers, to encourage the manufacture of an obsolescent mechanical color disc, to close its ears to the voice of the affected industries and dispassionate scientists alike, to keep in tune with the views

*Newspaper reports indicate that the rate of change has continued.

of only one—the champion of the CBS system—we submit, is to fall beyond the pale of prudence or common sense. A decision so shaped cannot be justified merely by an obsession that color must be inaugurated now—on November 20—the "magic date", as Judge Major called it.

Against this background we make our argument on the errors we have assigned.

I. THE DISTRICT COURT ERRED IN THAT:

(a) THE DISTRICT COURT GRANTED SUMMARY JUDGMENT DISMISSING THE COMPLAINT, NOTWITHSTANDING THE EXISTENCE OF AN ISSUE OF FACT AS TO WHETHER THERE HAD BEEN SUCH DEVELOPMENTS IN THE PERFECTION OF COLOR TELEVISION AFTER THE HEARINGS WERE CLOSED IN MAY, 1950 THAT THE COMMISSION ABUSED ITS DISCRETION IN REFUSING TO TAKE EVIDENCE AS TO THOSE DEVELOPMENTS;

(b) THE DISTRICT COURT DID NOT GRANT APPELLANTS THE STATUTORY REVIEW TO WHICH THEY WERE ENTITLED, BUT DECIDED THE CASE PRO FORMA IN THE INTERESTS OF OBTAINING AN EARLY DECISION BY THIS COURT.

(a)

It is our contention that the drastic remedy of summary judgment was unavailable on the state of the record in the District Court. Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment without trial if it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." Summary judgment is not to be granted where there is "the slightest doubt as to the facts." (*Arnstein* v. *Porter*, 154 F (2) 464, 468, CCA 2, 1946). And this Court has said:

> "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them * * *". *Associated Press* v. *United States*, 326 U. S. 1, 6 (1945).

One of the issues before the District Court was whether the Commission had abused its discretion in refusing to consider changes and improvements in the television art developed during and after the close of its hearings in May, 1950. Plaintiffs urged on the District Court that the Commission had not complied with its statutory duty to consider, in its rule making, "all relevant matter presented" (60 Stat. 238; 5 U. S. C. § 1003(b)). The Commission had been asked to consider certain matters showing the tremendous improvements made in the RCA system during and after the close of the hearings. The Commission refused to inform itself of these improvements, which, it conceded, were a daily occurrence in this dynamic field (R. 411).

The resolution of the issue thus presented called for an evaluation of facts. If these improvements were of trifling significance, the Commission's discretion was not abused. If the improvements were substantial or revolutionary, its discretion might well be said to have been abused. The Court should not have foreclosed the plaintiffs from proving that the latter was the case.

The District Court recognized the force of our complaint in this respect. It conceded that "much progress was made during the latter portion of the hearings and . . .

after the hearings closed, in the development of a compatible system of color television", and said that "as we view the situation the most plausible contention made by plaintiffs is that the Commission abused its discretion in refusing to extend the effective date of its order so that it might further consider the situation, and particularly the improvement which it is claimed had been made by RCA and others".

Nevertheless the District Court held that "there is no evidence . . . which this court could properly hear . . . for the purpose of showing current developments . . . which have been called to the attention of the Commission and which it refuse[d] to consider . . . We reiterate that . . . our function is to hear and determine the questions before us solely on the record made before the Commission . . ." So the Court denied to us the opportunity to show to it evidence which we believe—and the court inferentially assumed—it was erroneous for the Commission to ignore.

In the determination of the issue of whether the Commission abused its discretion by refusing to reopen the record for the purpose of considering new evidence, the Court was obviously not bound by the record thus claimed to be improperly closed. It was bound to examine the facts whose rejection plaintiff claimed to be an abuse of discretion.

The denial of summary judgment would not have required a trial *de novo* of the merits of the several systems. It would merely have afforded plaintiffs the opportunity to show that the changes were of such an order of magnitude that the Commission should not have taken final action without evaluating them.

(b)

The District Court failed to grant appellants the judicial review which the cause required. This clearly appears from the following portions of the opinion of the majority:*

> "After listening to many hours of oral argument by able counsel representing the respective parties, we formed some rather definite impressions relative to the merits of the order, as well as the proceedings before the Commission upon which it rests. And our reading and study of the numerous and voluminous briefs with which we have been favored have not altered or removed those impressions. Also, in studying the case, we have b n unable to free our minds of the question as to *why we should devote the time and energy which the importance of the case merits*, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court. This is so because any decision we make is appealable to that court as a matter of right and we were informed during oral argument, in no uncertain terms, that which otherwise might be expected, that is, that the aggrieved party or parties will immediately appeal. In other words, *this is little more than a practice session* where the parties prepare and test their ammunition for the big battle ahead."
>
> * * * * *
>
> "Thus, as we evaluate the situation, there are two courses open, (1) to allow defendants' motion for a summary judgment, and (2) to vacate the order and send the proceeding back to the Commission for further consideration in view of recent developments in the color television field as well as the rapid

*R. 863, 866, 875.

> changing economic situation. A pursuance of the latter course, assuming we have such authority, of which there may be doubt, would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court. In other words, the interests of all, so we think, will be better served with this controversy *on its way up rather than back from whence it comes.*" (emphasis supplied).

Thus the District Court passed the cause on to this Court stating that it would be better on the way up than on the way down. In so doing, it failed to give due consideration to the basic issues which are now presented here on the merits.

This Court has many times emphasized the duty of the District Courts and the Courts of Appeals to make appropriate disposition of causes before them. This duty stems from the appropriate relationship of the lower courts to this Court and relates to the proper exercise of the functions and duties conferred on them in the disposition of matters submitted for decision. As will be noted from the cases cited, *infra*, there have been occasions where District Courts have made hurried *pro forma* dispositions of cases in a desire to get them up to the appellate courts in the interest of expedition and finality. Time and again this Court has admonished against such practice.

Thus, in *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656 (1949), a cease-and-desist order issued by the Board was refused enforcement by the Court of Appeals on the ground of bias, without considering the impact of the Administrative Procedure and the Taft Hartley Acts. This Court, saying (p. 662) that "these questions should be considered in the first instance by the Court of Appeals", remanded the cause.

Similarly, in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949) a District Court of three judges dismissed a suit brought by the United States to set aside an order of the Interstate Commerce Commission, denying an award of reparations to the Government as a shipper without reaching the merits, on the theory that the Government could not sue itself. "Since the District Court did not pass on the merits of the allegations of the complaint, * * *" the cause was "remanded * * * for that purpose" by this Court (p. 444).

Again, in *Federal Communications Commission* v. *WJR*, 337 U. S. 265 (1949) the Commission denied WJR's petition for reconsideration of an order granting to Tarboro an application for a permit to construct a radio station. The Court of Appeals reversed because of the Commission's failure to grant WJR an oral hearing, and "refused to consider whether the Commission was right in its legal conclusion" that WJR could not complain of the grant of the license to Tarboro. This Court held that WJR was not entitled to an oral hearing but was entitled to review by the Court of Appeals of the "merits of the question" (p. 285). "That question, being one of law, might now be decided here. But since the statute, if it affords respondent a right of appeal, provides that it shall be to the Court of Appeals, and since that court has not decided the basic issue on the merits * * * the cause should be remanded to the Court of Appeals for decision of that question * * *" (p. 285).

The principle of these cases has been stated by this Court (per Holmes, J.) to be that "it is not desirable" where "the District Court had jurisdiction and a duty to try the question" for this Court to "pass upon such matters until they have been dealt with below * * *" (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293 (1922)).

See also:

Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257, 267 (1910);

William Cramp & Sons Co. v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645, 647, 648-9 (1913);

Lamar v. *United States*, 241 U. S. 103, 110 (1916);

Brown v. *Fletcher*, 237 U. S. 583, 587 (1915);

Marconi Wireless Telegraph Co. v. *Simon*, 246 U. S. 46, 57 (1918);

Ex Parte Harley-Davidson Motor Co., 259 U. S. 414, 417-418 (1922);

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 424-425 (1926) (dissent per Brandeis, J.).

Moreover, the judicial review provided by Congress "as an additional assurance that its policies be executed" (*United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 489 (1942)), has received added emphasis in the Administrative Procedure Act. Under that Act Congress has enjoined on the reviewing court the duty to decide all relevant questions of law, interpret statutory and constitutional provisions, determine the scope of any agency action, and set aside such action or findings if in violation of the standards set by the statute (60 Stat. 243, 5 U. S. C. § 1009).

Effective enforcement of that policy can only be achieved, as indicated by the decisions adverted to above, by remanding this case to the District Court to review the Order of the Commission in pursuance of the duty enjoined upon it.

II. THE COMMISSION'S ORDER IS INVALID BECAUSE:

(a) THE COMMISSION'S FINDINGS OF SEPTEMBER 1, 1950, DID NOT JUSTIFY THE ORDER OF OCTOBER 10, 1950, ADOPTING THE CBS SYSTEM; ON THE CONTRARY, THE COMMISSION FAILED TO FIND THAT THE CBS SYSTEM WAS SATISFACTORY, AND ITS ORDER WAS ADMITTEDLY BASED IN AN IMPORTANT PART ON SPECULATION AND HOPE;

(b) THE COMMISSION'S ORDER WAS ARBITRARY AND VIOLATIVE OF ADMINISTRATIVE DUE PROCESS BECAUSE IT SOUGHT TO IMPOSE UPON THE MANUFACTURERS OF TELEVISION SETS, OVER WHOM THE COMMISSION HAD NO JURISDICTION, CONDITIONS WHICH, AS A PRACTICAL MATTER, COULD NOT BE COMPLIED WITH EVEN IF THIS HAD BEEN WITHIN THE COMMISSION'S AUTHORITY, AND THE COMMISSION INSISTED THAT THERE BE NO HEARING AS TO THE IMPOSITION OF THESE CONDITIONS;

(c) THE COMMISSION'S FINDINGS DO NOT JUSTIFY ADOPTION OF ANY COLOR STANDARDS AT THIS TIME IN VIEW OF THE FLUID AND RAPIDLY DEVELOPING STATE OF THE ART; AND

(d) IF IT WAS PROPER FOR THE COMMISSION TO ADOPT COLOR STANDARDS AT THIS TIME, THE COMMISSION FAILED TO CONSIDER WHETHER, OR TO FIND THAT, THE CBS AND RCA COLOR SYSTEMS COULD NOT SUCCESSFULLY CO-EXIST, AND ARBITRARILY EXCLUDED THE RCA COLOR SYSTEM.

(a)

In its Findings and First Report of September 1, 1950, the Commission did not finally adopt the CBS system. The Commission found only that the system was satisfactory "from point of view of texture, color fidelity and contrast" (R. 163). It immediately went on to find serious defects in the system: "the susceptibility to flicker . . . is greater than in the present monochrome system . . ."; and "the CBS system is subject to color fringing or color break-up under certain circumstances . . ." (R. 163). "The CBS system has less geometric resolution than the present monochrome system. . ." (R. 163). "The CBS system is, as a practical matter, limited to . . . direct view tubes of no greater size than 12½ inches . . ." (R. 164).

These findings manifestly would not have warranted an over-all finding approving the CBS system, and none such was made. In the Second Report of October 10, 1950, ordering the adoption of that system, the Commission for the first time made a flat declaration that adoption of the CBS system would be in the public interest (R. 420); but this Report was based upon no further evidence, none having been taken.

Not only was the Order thus unsupported by the findings, it was based in an important part on speculation and hope, as the Commission itself admitted. The Commission did not know whether the tri-color tube—pioneered and developed by RCA and others—could be used with the CBS system (R. 164-165). If it could, then the CBS equipment was obsolete before adoption, for the tri-color tube was not restricted in size and would eliminate the cumbersome and expensive color wheel (R. 164). During

the course of the hearings, which stretched from September 26, 1949, to May 26, 1950, constant and rapidly mounting improvements were made in the tri-color tube, so much so that in its First Report the Commission frankly stated it was confronted with "difficult courses"—whether to reopen the hearings in order to inform itself as to the latest developments in the RCA tri-color tube, or to adopt the CBS standards at once in the "confidence" that the electronics engineer would, by perfecting the tube (if it was not already perfected), extricate the Commission from the havoc it would create by adopting the CBS system. The Commission was frank to admit that the "advantage" of reopening the hearings "is that the Commission would not be compelled to *speculate as to an important basis for its decision*, but would have a definitive answer on . . . which to act . . ." (R. 165; italics ours). And the Commission could not deny that to adopt the CBS system on September 1 would be erroneous: "The disadvantage is that the Commission's determination on an important part of its decision would be based on *speculation and hope* rather than on demonstrations . . ." (R. 165; italics ours).

The Commission confessed that it was faced with the same difficult choices as to three other matters: "horizontal interlace," "persistence phosphors", and "the possibility of new color systems" (R. 165-166).

The Commission, nevertheless, concluded not to reopen the hearings. By its own admission, therefore, an "important part of its decision" was based upon pure "speculation and hope", rather than upon evidence. It is submitted that the rights of parties ought not to be thus determined, and that the speculative basis of the Commission's order is an additional and independent ground for setting it aside.

(b)

The Commission's unwillingness to order the adoption of the CBS system at the time of its First Report was quite natural in view of the inconclusive and speculative nature of the evidence. However, instead of postponing any order until the state of the art had developed sufficiently to enable action to be taken with prudence and confidence, the Commission embarked upon an unprecedented and arbitrary course. In its First Report it entered an order, the effect of which was to say to the manufacturers, who for reasons similar to those advanced by Emerson were vigorously against the adoption of the CBS system:

> We will impose that system upon you:
>
> (a) Unless a "sufficient number" of you (R. 167) assure us that you will hereafter manufacture "the great majority of television receivers" in accordance with "bracket standards" to be promulgated by us, in such a way as to enable the receivers to convert CBS color broadcasts into black and white (so that if at some later stage we should find it necessary to order the adoption of that system, the owners of the sets acquired in the meantime will be able to enjoy black and white broadcasts without having to buy expensive adapters); and
>
> (b) Unless we may adopt these "bracket standards" (which we are including now in a "Notice of Proposed Rule Making") as final, without a hearing (R. 167).

The Commission had no jurisdiction over the manufacturers. By holding over their heads the threat of an order to impose the CBS color system upon them, to their great injury, the Commission sought to exact from them a promise

to furnish their sets with a modified equipment geared to the proposed "bracket standards". This new equipment was as yet untried. The Commission apparently believed, however, that if it were adopted it would enable the new sets to convert CBS color to black and white without adapters, in case the CBS system were later effectuated by order of the Commission. The Commission was unwilling to enact the proposed "bracket standards" into rules unless assured that it could do so without a hearing.

Such was the alternative presented to the manufacturers as the price of avoiding an order imposing upon them the CBS system of broadcasting. They were given less than 30 days in which to make up their minds. The First Report, containing this extraordinary alternative, which if it had been accepted would have relieved the Commission from the embarrassing task of ordering the immediate adoption of the CBS system upon a record shot through with "speculation and hope", was put forth on September 1, 1950. The manufacturers were given only until September 29, 1950, to decide whether or not they would give the necessary assurances to the Commission (R. 167). As might have been foreseen, they concluded that it was wholly impracticable to give such assurances. Accordingly, on October 10, 1950, as previously described, the Commission entered its order adopting the CBS color system.

A reading of the Second Report embodying this order leaves no doubt that it was the inability of the manufacturers to comply with the bracket standards—the Commission's language was "unable or unwilling"—which prompted the final order. In the dissenting opinion of Commissioner Sterling one finds a fuller statement of the problems faced by the manufacturers. Commissioner Sterling documents

the surprise and confusion which followed the First Report; the time lost in attempts at clarification; the engineering problems faced by an industry willing and anxious to conform, but unable to meet an impossible time schedule; the serious problems of production, procurement and manpower created by the demands of national defense which harassed the industry; and the shortage of basic materials which hampered the industry. These matters led the Commissioner to conclude "that the Commission's time table presented to industry in its First Report to build in bracket standards was unreasonable" (R. 426), and that he should therefore "dissent from this premature action taken by the majority at this time" (R. 421). Commissioner Hennock's dissent, emphasizing the "progress made in the development of color television since the start of the proceeding" stated that, "it is of vital importance to the future of television that we make every effort to gain the time necessary for further experimentation leading to the perfection of a compatible color television system" (R. 430-431).

It is submitted that the Commission's procedure leading up to the October 10th order was arbitrary and violative of administrative due process: (1) In effect it delegated to a group of manufacturers the power to determine whether the CBS system would presently be mandated to the public, to the exclusion of any other, or whether further time should be devoted by the Commission to exploring the latest developments in the art with a view to the ultimate formulation of a decision based upon evidence and knowledge instead of "speculation and hope." (2) It was designed to exert pressure upon the manufacturers, without a hearing, and under extreme limitations of time, to agree to take action which the Commission could not require of them under the law.

Finally, it is submitted that the procedure adopted by the Commission—designed, if it had been successful, to afford the Commission, in its own language, "time to explore more fully the matters set forth above" (i.e., the latest developments in the art)—is one more piece of evidence that the Commission's Order of October 10th was based upon conjecture rather than upon facts.

(c)

An additional reason why this Court should set aside the Commission's order is that in view of the fluidity and rapidity of development of the art of color broadcasting, the Commission acted arbitrarily and contrary to the public interest in freezing that development by the premature adoption of the CBS system.

Until the issuance of the order here challenged, the Commission, acutely aware of the dynamic nature of the electronics field, had acted with the utmost caution. When black and white standards were pressed on its attention, it prudently withheld action until assured by scientists and the industry that action was proper. And it explained (in 1941) the proper relation of the administrator to the scientist in these words (R. 563):

> "In its regulation of television in the public interest, the Commission, in the light of the evidence before it, has set as its goal unfettered technical development and engineering advance. In dealing with the problem of setting television transmission standards the Commission has, therefore, sought to avoid action which would freeze the state of the art at an unsatisfactory level of performance.
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> * * * * *

> "The art of television has been under development for more than a decade. During this time the Commission has issued a number of licenses for experimental purposes looking toward the development of the science to the point where the Commission could be reasonably assured of television's readiness for a competitive public service upon a sound technical basis and upon a single uniform system."

When we lay these words of discreet self-limitation beside the Commission's own admission of the state of the color art in 1950, we know at once the fatal error of the Commission's order: it represented action when every dictate of common sense cried for cautious delay. As the Commission admitted:

> "The state of the television art is such that new ideas and new inventions are matters of weekly, even daily occurrence; . . . (R. 411).
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> * * * * *
>
> "The Commission is aware that the institution of these proceedings stimulated great activity in the color field and that since fundamental research cannot be performed on schedule, it is possible that much of the fruit of this research is only now beginning to emerge . . ." (R. 166).

And Commissioner Hennock stated that:

> "The improvements which took place during the course of the hearings, a relatively short time when compared to the previous course of television development, was impressive . . ." (R. 190)

The Commission further stated in its First Report (R.165-166):

"147. Three other matters present the Commission with the same difficult choice between the two courses of action referred to above [i.e., to reopen the hearings or to adopt the CBS system]. Two developments were demonstrated in this hearing which hold real promise for increasing definition both in color and black and white pictures. One is horizontal interlace and the second is the efficacy of long persistence phosphors in reducing flicker, thus providing the means for decreasing the field rate and increasing the number of lines in the picture. Both of these techniques require further testing and, if successful, may make desirable additional changes in the field and line repetition rate.

"148. The third matter we refer to is the possibility of new color systems and improvements in existing color systems which have been informally called to our attention since the hearings closed. Of course, these are not matters of record and cannot be relied on in reaching a decision unless the record is reopened. . . ."

One would have supposed that in the light of these facts the Commission could rationally have reached but one conclusion: to extend the hearings and consider the new developments. But the Commission, determined upon an opposite course, went on to say:

"On the other hand, the Commission cannot overlook the obvious fact that one of the easiest methods of defeating an incompatible system is to keep on devising new compatible systems in the hope that each new one will mean a lengthy hearing so that eventually the mere passage of time overpowers the incompatible system by the sheer weight of receivers in the hands of the public" (R. 166).

In this passage the Commission implies a helplessness which the nature of the Order entered by it on October 10th shows to have been unreal. The Commission was perfectly capable of cutting short at any time the process of investigating new compatible systems, just as it cut short that process on October 10. The Commission suggested in the quoted passage, however, that if it had opened up the hearings to explore the latest developments it would have been bound to go on and on indefinitely exploring new developments, until in time the incompatible system invented by CBS would become a dead letter and would never reap any fruits. Obviously, however the Commission's freedom of action would in no way have been circumscribed if it had reopened the hearings to consider the latest developments in the art. It might well have concluded after such a reopening that the developments indeed were such that in the public interest it would be altogether premature and injurious to direct the adoption of the CBS system. Or the Commission might have concluded that the developments were not sufficiently promising to warrant further delay and it could then have made a finding—not based on "speculation and hope"—that the CBS system was, in the light of all the available facts, a satisfactory one for the country. The Commission, in short, would still have remained the master of its own house.

The very fact that the Commission should have gone out of its way to pose this unreal alternative to immediate approval of the CBS system obscures, rather than illuminates, the Commission's real reason for haste. Yet, viewed from another angle, the quoted passage suggests a motivation which, if it were the true one, must surely be regarded as improper, namely, that the originator of an incompatible

system ought not to be prevented from putting it upon the market by the efforts of rival compatible systems to cause Commission investigations of their claims. But why this solicitude for an incompatible system? The Commission's own Report concedes that incompatibility is a disadvantage to the myriad owners of existing sets who must buy expensive adapters and converters in order to enjoy incompatible broadcasts. The Commission seemed to argue that there was a presumption in favor of the incompatible system arising merely out of its primacy in development. In this case, however, at the very time that the Commission decided to bestow its approval upon the incompatible CBS system, it knew that rapid developments in the art of color broadcasting through compatible systems had occurred during the course of the hearings, and yet the Commission refused to take the relatively little additional time which would have been necessary to consider these developments before arriving at a final conclusion. It need not have taken this action on its own motion, for on October 4, 1950 RCA petitioned the Commission to review the improvements made in the RCA system, stating that by "June 30 we will show that the laboratory apparatus which RCA has heretofore demonstrated has been brought to fruition in a commercial, fully-compatible, all-electronic, high-definition system of color television available for immediate adoption of final standards" (R. 409).

On October 10, 1950 the Commission denied the RCA petition out of hand with a brusque reference to "administrative finality"* and, on the next day, issued its Second Report and Order adopting the CBS standards (R. 413-434).

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*Exhibit F annexed to Complaint; R. 411.

It is submitted that this action was arbitrary, and that it betrayed a bias toward the incompatible CBS system unwarranted by anything in the record.

(d)

In addition to adopting CBS color, the Commission's order excluded RCA color.* But there were no findings supporting and justifying such an exclusion. There were no findings that only a single system of color must be adopted, or that the RCA system would interfere with the CBS system, or with the existing monochrome system. Indeed, and to the contrary, there was a finding that RCA color could be received as satisfactory black and white on existing receivers (R. 160). Since compatibility is a highly coveted characteristic of color transmission, it would appear to be very much in the public interest to allow RCA color; certainly the exclusion of RCA color should not stand unless supported by a finding that RCA color was not in the public interest.

These findings do not exist. Their absence renders invalid the order which excludes RCA color.

The Commission, when it excluded the RCA system, may have acted under a compulsion induced by an erroneous view of the law. It may have assumed that the Communications Act of 1934 required that only one system of color be allowed to operate. We have used the word "may" advisedly, for we do not know what was the Commission's

*The Commission, by adopting technical standards appropriate only to CBS color, excluded RCA color. Judge Major asked the Commission's counsel: "If they don't like the color broadcast of CBS can they turn to some other color broadcast?" Counsel admitted: "They cannot receive RCA color broadcasts, and the reason they cannot receive RCA color broadcasts is that they have not been authorized under Commission standards . . .".

view. We are entitled to know. There should have been findings on this point. (*Yonkers* v. *United States*, 320 U. S. 685 (1944).)

If, as a matter of law, several competing systems of color could be allowed to broadcast under the Communications Act of 1934, and if the Commission erroneously decided, as a matter of law, that only one system could be permitted, then its decision excluding RCA would be wrong if based on that incorrect view of the applicable law. Moreover, it may be that if the Commission understood that under the law, two, or more, non-conflicting color systems could operate simultaneously, it would not have excluded RCA from the air. Since the Commission has failed to make findings on this point, it is impossible to know whether its exclusion is based on a misconception of the law, or the facts, or both.

This Court has pointedly refused to sanction administrative orders which could have been based on improper views of the law buried in vague findings. It has said:

> ". . . if the action is based upon a determination of law as to which the reviewing authority of the Courts does come into play, an order may not stand if the agency has misconceived the law." (*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943).)
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> ". . . If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away." (*United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 489 (1942).)

And there is another matter in which the Commission's view of the law may have compelled an erroneous conclusion. We refer to section 303 (e) of the Communications

Act (48 Stat. 1082; 47 U. S. C. § 303(e)), which is the vital source of Commission power. This section authorizes the Commission "to regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions . . ." It is conceivable that the Commission felt that under this statute it was compelled to choose only one system, and so it fixed standards tailored to fit just that system. But there is nothing in the words of 303 (e), or in the statutory history, or in policy, which requires that regulation by the Commission should be limited to the choice of only one system. To the contrary, there are important considerations which impel the view that 303 (e) permits a range of standards, or the fixing of minimal criteria in standards.

It is conceivable that there may be several acceptable systems of broadcasting color, each of which may be superior in separate ways, and all of which may produce good color broadcasts. There is no sound reason why all of such systems may not be allowed to broadcast their color, so long as they fall within a range of acceptable standards. Such a view of the law would require the Commission to fix such a range and allow the operation of all systems which come within its scope. This would permit competition, which is in the public interest. Here, it would also allow RCA to broadcast its compatible system, which is equally in the public interest.

Presumably, when the Commission adopted its October 10, 1950, Order, it believed that 303 (e) required it to choose only one system. We think this to be wrong, because the statute clearly permits more than one system, so long as the external effects and the purity and sharpness of the emissions of each system falls within the range of acceptable broadcast contemplated by 303 (e).

The only other ground on which it can be supposed that the Commission saw fit to frame its standards in such a way as to exclude the RCA system, while permitting the CBS system; is that, as the Commission found, the RCA color broadcasts had not yet been developed to as satisfactory a point as the CBS system, deficient as the latter was. We need not here advert to the point already made that the Commission arbitrarily refused to consider the state of the development of the RCA system which had been achieved during and after the hearings, so that there was no way of telling whether, at the time the Commission's Order was finally entered, the RCA color system was not the equal of the CBS system. Assuming for the sake of argument that even as of that time the RCA color broadcasts had not yet reached as satisfactory a point of development as the CBS color broadcasts, we nevertheless submit that since, as the Commission found, the RCA color broadcasts could satisfactorily be received in black and white by any owner of a set who might not choose to receive them in color, the possible deficiency in the quality of the RCA color broadcasts should not have operated to exclude the system from the air.

If the art of color broadcasting had, at the time of the Commission's Order, reached a mature point of development, the Commission might perhaps have been warranted in excluding from the air the inferior of the two systems. But the Commission's own findings demonstrated that the art was in its infancy and developing at a pace which was bewildering even to the Commission. Given this fundamental fact, to which the Commission paid so little heed, what rational ground existed for excluding the RCA system from competitive development along with the CBS system?

Suppose that, for a short time, the RCA color broadcasts proved in fact to be inferior to the CBS. As previously stated, all set owners could at any time receive in black and white the RCA color signals without the addition of new equipment; and if the superiority of the CBS system were such as to win the favor of the public, the RCA system would have to be either abandoned or improved to the point where it could successfully compete with the CBS system. This process of competition has, of course, been the life-blood of our economy and the great begetter of inventions. In the fluid state of the color broadcasting art, how can it be doubted that if the RCA and the CBS systems were allowed to compete with one another, improvements in each would not constantly be made, thus giving the public greater and greater quality of reception until, when the art reached full maturity, one system or the other would finally gain the ascendancy?

As stated at the outset, Emerson has no interest in one system or another. It is concerned only with the establishment of a condition of affairs in which the maximum possible advance in the art of color broadcasting may be achieved, to the end that Emerson may constantly improve its own products and the service which it renders to the public. It is the great tragedy of the Commission's Order that at the very moment when color broadcasting was about to burst into a long and multiform blooming the Commission should have seen fit to stunt its growth by arbitrarily cutting off the freedom of one of its branches to contribute its blossoms.

The injury caused by the Commission's precipitate and restrictive action was not merely to RCA, and not merely to the set manufacturers, but to the public, whose interest,

lies, at this stage of art, in its fullest and freest development.

CONCLUSION

The Commission's order should be annulled. In the alternative, the matter should be remanded to the District Court for proper review, or to the Commission to take such action and make such findings as will permit proper judicial review.

Respectfully submitted,

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